Supreme Court, U.S.
FILED

No. __-____ 00-394 JUN 29 2000

OFFICE OF THE

IN THE

Supreme Court of the United States

MARY TERESE CAMPBELL,

Petitioner,

—v.—

CANTOR FITZGERALD & CO., INC., CANTOR FITZGERALD SECURITIES CORP., CANTOR FITZGERALD L.P., a Limited Partnership, HOWARD LUTNICK, and HARRY NEEDLEMAN, jointly and severally,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PATRICK J. MURPHY
Counsel for Petitioner
40 Wall Street
New York, New York 10005
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48pp

QUESTION PRESENTED

1. Whether Petitioner had been denied adequate review of an arbitration award rendered without findings of fact under the test of the doctrine of manifest disregard of the law/evidence after the District Court had twice refused to review the Record Transcripts proffered to the court, first at a pre-briefing conference and thereafter on a Rule 59 motion for reconsideration of the District Court underlying decision

2. Whether the Court of Appeals improperly limited review of Petitioner's appeal to review solely of the District Court's denial of reconsideration rather than to the District Court's underlying judgment.

3. Whether in its limited review of the District Court decision under Rule 59 F.R.Civ.P. the Court of Appeals nonetheless had abused its discretion in failing to conclude there was no reasonable basis for the District Court's decision.

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Petitioner Mary Terese Campbell respectfully petitions for a Writ of *Certiorari* to review a Summary Order of the United States Court of Appeals for the Second Circuit in this case.

ORDERS BELOW

The Summary Order of the Court of Appeals is not reported but is reprinted at Appendix B.

The District Court's memorandum decision of October 20, 1999 and September 24, 1999, respectively denying Petitioner's petition to vacate the arbitral award and dismissing Petitioner's complaints on grounds of *res judicata* and denying petitioner's motion for rehearing, are reported at 21 F.Supp.2d 341 (SDNY, 1998).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was issued on December 23, 1999. The appellate court denied Petitioner's petition for rehearing by order dated March 1, 2000. This petition is timely filed pursuant to an extension of time to file by June 29, 2000 granted by Justice Ruth Bader Ginsburg by the Clerk's notice dated June 12, 2000. The jurisdiction of this Court is invoked under 28 USC § 1254(1). Petitioner first invoked federal court jurisdiction in this case under 28 USC § 1332 (because Petitioner is a citizen and resident of the State of Illinois and the Respondent is a resident of the State of New York).

STATUTES INVOLVED

The Federal Arbitration Act, 9 USC Section 1 *et seq.*

STATEMENT OF THE CASE

Petitioner Mary Terese Campbell initiated the action herein as the result of the publication by Respondents Cantor Fitzgerald *et al.*, her former employers, of a defamatory form U-5 notice of termination, filed with the National Association of Securities Dealers ("NASD") ending her employment as a registered bond sales representative in March 1992.

Campbell began by filing a claim with the NASD pursuant to a mandatory arbitration provision imposed on Campbell as a condition of employment when she first joined Cantor Fitzgerald in 1987. Campbell's claim included a claim of wrongful termination but chiefly centered on the defamatory statements published in the U-5.

Campbell claimed the U-5, stating that she had been terminated for "failing to follow firm procedures," was not only defamatory but a reprisal for a protest lodged by her husband, a former Cantor Fitzgerald bond arbitrageur who had resigned after Cantor Fitzgerald failed to heed his complaints against certain of Cantor Fitzgerald's bond auction practices which were violative of U.S. Treasury Department regulations.

Campbell's husband thereafter notified the Treasury Department of these violations, and a resulting SEC investigation culminated in imposition of penalties on Cantor Fitzgerald.

Campbell was terminated and the defamatory U-5 filed after the *Wall Street Journal* published news of the SEC investigation March 11, 1992. After republication of the defamatory U-5 prevented Campbell from gaining employment in the securities industry, she filed her claims with the NASD. The NASD panel denied her claims without findings of fact and imposed forum fees of $45,000 by award of March 5, 1998. The District Court denied Campbell's Petition to Vacate the award by Memorandum Decision filed September 20, 1998. The District Court denied Campbell's Rule 59 F.R.Civ.P. motion for rehearing on October 24, 1998. The Court of Appeals affirmed the District Court by order December 23, 1999, and denied Campbell's petition for rehearing March 1, 2000.

This petition follows grant of extension of time to file this petition to June 29, 2000 granted by Justice Ruth Bader Ginsburg.

REASONS FOR GRANTING THE WRIT

The Court of Appeals began its review of the appeal below by impermissibly limiting the scope of review of the case already fully briefed and submitted by August 12, 1999 in respect of the District Court's decision of September 24, 1998. The Second Circuit, in an October 6, 1999 order, limited review to the District Court's Order of October 20, 1998 made pursuant to Petitioner's motion under Rule 59(e) Fed. R. Civ. P. and precluded review of the September 24th order, by an overly restricted reading of the Notice of Appeal filed in November 1998.

This undue restriction of the scope of review has been recognized as entirely contrary to the spirit of the Fed. R. Civ. P., by this Court in *Foman v. Davis.* 371 U.S. 178 (1962) at p. 181 (calling for liberal construction of notices of appeal to avoid technical barriers to review). Moreover, the Court of Appeals decision places an undue burden on reviews of arbitral awards under the "manifest disregard" doctrine, as if review here only concerned the credibility and weight of the evidence. Clearly, however, since the District Court did not permit submission of the record and transcript of the hearing for review, it could not have tested the award under the "manifest disregard" standard, much less given any consideration to the weight and credibility of evidence.

This case presents the Court with an opportunity to clarify the standard of review implicated under the manifest disregard standard, consistent with the policy favoring arbitration, yet protecting the parties' right to adequate judicial review of arbitral awards, which is otherwise clouded by the subject decision herein.

I.

THE COURT OF APPEALS FAILED TO ACCORD PETITIONER ADEQUATE JUDICIAL REVIEW OF AN ARBITRAL AWARD.

A. THE COURT OF APPEALS ERRED IN NARROWING THE SCOPE OF THE NOTICE OF APPEAL AS APPLYING ONLY TO DENIAL OF PETITIONER'S RULE 59 F.R.CIV.P. MOTION

On May 12, 1999, Petitioner filed her brief with the U.S. Court of Appeals for the Second Circuit, appealing from two judgments of the U.S. District Court in one paper, dated September 24, 1998, reciprocally denying her motion to vacate the arbitrators' award and dismissing the separate district court complaint filed in respect of a further republication of the subject defamatory U-5. Respondent duly filed its answering brief on June 25, 1999, in response to Petitioner's challenge.

After the matter had been fully briefed, the Court of Appeals, in denying Respondent's subsequent motion to dismiss the appeal as untimely, restricted the scope of the review of the fully briefed appeal. The Second Circuit limited the review set forth in the Notice of Appeal to a challenge to the District Court's denial of the Petitioner's Fed. R. Civ. P. Rule 59(e) motion, dated October 20, 1998.

On motion for rehearing to the Court of Appeals, Petitioner argued that the court had too narrowly restricted the language of the Notice of Appeal and that the briefs of both sides clearly evidenced the parties understanding that the appeal had been taken from the District Court's underlying judgment,

as well as its denial of the Petitioner's Rule 59(e) motion. Petitioner further pointed out that the Court of Appeals Order was untenable as in conflict with the Supreme Court's decision in *Foman v. Davis* 371 U.S. 178, 181 (1962) (appellant's appeal did not mislead or prejudice the other side and further, their briefs demonstrated the intent to appeal from the District Court's underlying judgment.) See *U.S. v. One 1977 Mercedes Benz*, 708 F.2d 444 (2nd Cir., 1983) at 451, *N.Y. Life Co. v. Deshotel.* 142 F.3d 873 (5th Cir. 1998), at p 884 (courts construe a notice of appeal liberally to avoid technical barriers to review.)

The Second Circuit therefore erred in narrowly limiting the review as otherwise fully explicated by the parties' briefs in response to their understanding of the Notice of Appeal. The Second Circuit restriction and limited view of proceedings, including Petitioner's appeal from the underlying judgment, was clearly erroneous and prejudicial to Petitioner's right to judicial review.

B. THE DISTRICT COURT DECISION FAILED THE "MANIFEST DISREGARD" STANDARD AND SHOULD HAVE BEEN REVERSED

Even with this reduced vision, the Court of Appeals should have seen that there was no basis for the District Court's denial of reconsideration. The District Court had clearly failed to take into account all the relevant circumstances and thereby had abused its discretion in failing to consider the transcript of the Record, first subpoenaed to the Court by Petitioner June 15, 1998 and offered at a pre-briefing conference June 19, 1998, and thereafter proffered again to the District Court for its Rule 59(e) review in September, 1998.

Inasmuch as the District Court refused to review the record there could be no basis for its inferring that the record gave colorable support to the summary arbitral award where the award itself made no findings of fact or rulings on evidence. The Court of Appeal's further assertion that Campbell "never furnished the transcripts to the Court" is clearly erroneous and refuted by the subpoena served on the NASD with notice to Respondent's counsel whereby the record was delivered to the Clerk of the Court in June of 1998.

The record had been proffered to the District Court at the pre-briefing conference held June 19, 1998, and the parties' briefs were filed well before and not merely at the time of the filing of the Rule 59(e) motion, as the Court of Appeals otherwise clearly misstates.

Without the Record to review and in the absence of any findings of fact by the arbitral panel, the Court of Appeals could have no reasonable basis for determining that "there is colorable basis for the District Court to conclude the panel's conclusions were not a manifest disregard of the law." Therefore, the District Court could not, as the Court of Appeals erroneously further stated, have properly deferred to the panel's factual determinations. The panel had made none. The Court of Appeals and the District Court here are engaged in an exercise of purest speculation. In the absence of findings of fact by the panel and unaided by a review of the record, neither court allowed itself a position to test the challenges made to the panel's award under the manifest disregard test raised by petitioner.

The Courts below, to the extent they assert the petitioner's argument go only to the credibility and weight of the evidence equally become purely conclusory and again are without basis for support in the absence of findings of fact by

the arbitration panel and/or any review of the record transcripts and evidence. Indeed the courts below thereby had not anything forming even a colorable basis to support the award from challenge here.

Clearly the Second Circuit and the District Court failed to provide the adequate judicial review required pursuant to *Wilko v. Swan,* 348 U.S. 427, 436-437 (1953); *Gilmer v. Interstate Johnson,* 500 U.S. 520 (1991) and delivered by Second Circuit recently in *Halligan v. Piper Jaffray, Inc.,* 148 F.3d 197 (2d Cir., 1998), cert den. 119 S. Ct. 1286 (1999). Accordingly, there was no reasonable basis here for upholding either the panel's award or the District Court's judgments.

Finally, the Second Circuit repeats the District Court's clearly erroneous assertion that Campbell "fails to identify a single legal principle or standard the District Court overlooked." This assertion is refuted by the record and the briefs, wherein Campbell set forth a clear case of defamation *per se*, based on a false U-5 and clearly exposed the District Court's failure to provide the adequate judicial review required by *Wilko, supra*, promised by *Gilmer, supra*, and delivered by *Halligan, supra,*. Campbell's brief is replete with examples of the arbitral panel's manifest disregard of the law and evidence and the District Court's clearly erroneous suppositions and fact findings.

Moreover, Campbell's brief (pp. 4-32) gave forth a full summary statement of the facts with citations to the record, uncontradicted by Respondents, the panel or the District Court. The factual support cited clearly makes out and supports Campbell's reliance on case law cited in her briefs and memoranda under the "manifest disregard" doctrine and Federal Arbitration Act, 9 U.S.C. Sec. 10. Under the circumstances, the Second Circuit's statement that Campbell had not identified the

legal standards or support overlooked by the District Court is clearly erroneous.

II.

THE ISSUES PRESENTED BY THIS CASE ARE OF GREAT IMPORTANCE

The Second Circuit's decision herein undermines the Federal policy favoring arbitration by undermining confidence in the availability of redress from arbitrary and capricious decisions by arbitrators. *Shearson American Express v. McMahon,* 482 U.S. 220, 226 (1987); *First Options v. Kaplan,* 514 U.S. 938, 942 (1995) (parties are to be bound by a decision not in manifest disregard of the law.) If arbitral panel decisions arrived at in manifest disregard of the law or the evidence are not tested by review of the record to determine whether the arbitral panel has consciously disregarded and failed to apply the law and/or the facts as explained to them, confidence in the arbitral process must be shaken and will ultimately collapse. Indeed, the securities industry, sensing a growing lack of public confidence in the mandatory arbitration process, has recently sought to bolster and maintain the arbitration process by eliminating some the abuses that have attended the procedure and affected panel determinations.

It is respectfully submitted that this Court must insure that adequate judicial review of the arbitration process not be undermined. Undue tolerance of arbitration panel awards which virtually ignore an employee's fundamental right to due process will doubtless undermine the arbitration process as a viable substitute for the right to trial. This is crucial where, as here, the employee is not protected by collective bargaining

representation and is required to arbitrate as a condition of her employment.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that her petition for a Writ of *Certiorari* be granted.

Respectfully submitted,

PM5229

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

United States Court House
40 Foley Square
New York 10007

ROSEANN B. MACKECHNIE
Clerk

Docket No. 98-9582

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 1 day of Mar two thousand.

Present:

HON. DENNIS JACOBS
HON. WILFRED FEINBERG
HON. ROBERT KATZMANN

Circuit Judges.

CAMPBELL,

Plaintiff-Appellant,

v.

CANTOR FITZGERALD, et al.,

Defendants-Appellees.

A petition for panel rehearing having been filed herein by Appellant Mary Terese Campbell

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

By: /s/ Beth J. Medor,
Beth J. Medor
Administrative Attorney

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMtGRY ORDER WILL NOT BE PtJBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE AT'I'EN'I'ION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of' the United States Court o£ Appeals f'or the Second Circuit, held at the United States Courthouse, Foley Square, in the City of' New York, on. the day 23rd, one thousand n nine hundred and ninety-nine.

[seal dated Dec. 23, 1999]

PRESENT: HON. WILFRED FEINBERG,
HON DENNIS JACOBS,
HON ROBERT A. KATZMANN,
Circuit Judges.

----------x

MARY TERESE CAMBELL,

Petitioner-Appellant,

-v-

CANTOR FITZGERALD & CO, INC.,
HOWARD LUTNICK, Jointly and severally,

HARRY NEEDLEMAN, Jointly and severally

Respondents-Appellees.

----------x

APPEARING FOR APPELLANT: PATRICK J. MURPHY, New York, NY (Murphy & O'Connell, on the brief)

APPEARING FOR APPELLEES: MICHAEL A. LAMPERT, Princeton, NJ (Saul, Ewing, Remick & Saul LLP, on the brief)

Appeal from the United States District Court for the Southern District of New York (Chin, .J.) .

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment be **AFFIRMED.**

Mary Terese Campbell appeals from the order of the United States District Court for the Southern District of New York denying her motion for reconsideration. In two related actions brought by Campbell, the district court denied her petition to vacate an arbitration award and dismissed her d.efamation action. The district court then denied Campbell's Rule 59 motion for reconsideration. As determined by a motions panel of this Court, Campbell's appeal challenges only the denial of the motion for reconsideration, not the underlying judgments in the two actions.

A motion for reconsideration will be granted by a district court only where the court has "overlooked matters or controlling decisions' which, had they been considered, might reasonably have altered the result reached by the 'court." Adams v. United States, 686 F. Supp. 417, 418 {S.D.N.Y. 1988) {quoting Local Civil Rule 3(j)) . This Court reviews a district court's denial of a motion for reconsideration for abuse of discretion. See, Devlin v.Transportation Communications Int'l Union, 175 F.3d 121, 132 (2d Cir. 1999) . Where "the district court takes into account all of the relevant circumstances, [this Court] will, in most cases, .affirm its determination, even if [this

Court] "would have reached a contrary outcome in the first instance. " In re Emile Gouiran, 58 F.3d 54, 58 (2d Cir. 1995) . Under this highly deferential standard, we will not reverse unless we conclude that "there was no reasonable basis for [the district court's] decision." In re Lancaster Factoring Co.. Ltd., 90 F.3d 38, 42 (2d Cir. 1996) (quoting SEC v. Bausch & Lomb. Inc., 565 F.2d 8, 18 (2d Cir. 1977) {internal quotation marks omitted)) .

Campbell's argument on appeal is that the district court should have examined the transcripts of the arbitration proceeding, and that if it had the cour't would have reversed i'ts earlier judgmen'ts in both actions. Campbell's argument fails for two reasons.

First, Campbell never furnished the transcripts to the court after being given a reasonable opportunity to do so. At a pre-trial conference, the district court instructed Campbell. "to submit [memoranda of law) and anything else that she wanted to be part of the record by (July 13, 1998)." Campbell did not submit the transcripts in accordance with this permission. The district court decides a motion for reconsideration on the bas.is

of the evidence in the record, and we therefore will not reverse on the basis of matters outside the record. Even if Campbell had submitted the transcripts to the court along with her Rule 59 motion, the district court would have properly disregarded the evidence because it was previously available to Campbell, and therefore was not "newly discovered evidence' that might have justified reconsideration of the court's decision." Lightfoot v. Union Carbide Corp., 110 F.3d 898, 909 (2d Cir. 1997); see Certain Underwriters at Lloyd's London v. St. Joe Minerals Corp., 90 F.3d 671, 675 (2d Cir. 1996) .

Second, even if Campbell had properly entered the 'transcripts, there was a reasonable basis for the district court to conclude the arbitration panel's conclusions were not in manifest disregard of the law. Campbell's arguments all go to the credibility and weight of the evidence. The district court properly deferred to the arbitration panel's factual determinations. See International Bhd. of Elec. Workers v. Niag~ra'Mohawk Power Corp., 143 F.3d 704, 706 & 725-26 (2d *Cir.* 1998) . Campbell fails to identify a single legal principle or standard that the district court overlooked. Campbell's motion merely attempted to retry her case. The district court certainly did not abuse its discretion in rejecting Campbell's repetitive arguments on its review of the Rule 59 motion. See Schonberaer v. Serchuk, 742 F. Supp. 108, 119 (S.D.N.Y. 1990) ("The provision for reargument *is* not designed to allow wasteful repetition of arguments already briefed, considered and decided.").

We have considered Campbell's other arguments raised on appeal and conclude they identify no abuse of discretion by the district court.

In addition to the appeal of the Rule .59 decision, there are two pending motions in this appeal that we also resolve today.

First, Campbell has moved pursuant to Fed. R. App. P. 10(e) to correct the record on appeal by adding to it the transcripts of the arbitration proceedings. Because the district court decided Campbell's Rule 59 motion on the present record, the actual transcripts are irrelevant to our limited examination of the district court ruling under review. The motion to correct the record is therefore denied.

Second, Cantor Fitzgerald seeks sanctions against Campbell for including unnecessary materials in the appendix in violation of Fed. R. App. P. 30(a) (2}. Because (i) we affirm the district court order in favor of Cantor Fitzgerald, and (ii) costs are taxed.against an unsuccessful appellant pursuant to Fed. R. App. P. 39(a) (2), we deny the motion for sanctions as moot.. Appellant Campbell is ordered to pay costs, including the cost incurred by Cantor Fitzgerald for preparing the supplemental appendix. See Karvelis v. Constellation Lines S.A., 806 F.2d 49, 54 (2d Cir. 1986) .

For the reasons set forth above, the judgment is hereby **AFFIRMED.**

FOR THE COURT:
KAREN GREVE MILTON,
ACTING CLERK

By:
/s/ Ralph A. Anderson
RALPH A. ANDERSON, Deputy Clerk
ACTING OPERATIONS MANAGER

APPENDIX C — MEMORANDUM DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED OCTOBER 20, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

98 Civ. 3973 (DC)

MARY TERESE CAMPBELL,

Petitioner,

– against –

CANTOR FITZGERALD & CO., INC., *et al.*,

Respondents.

MEMORANDUM DECISION

* * *

CHIN, D.J.

Petitioner Mary Terese Campbell moves pursuant to Fed. R. Civ. P. 59 to vacate the judgment entered herein on the grounds that my Memorandum Decision dated September 24, 1998 was based on "(1) manifest errors (a) of fact and (b) of law and (2) should be altered to prevent manifest injustice." For the reasons set forth in the Memorandum Decision, the motion to vacate is denied. I add only the following:

Appendix C

1. Petitioner now contends that her original motion to vacate the arbitration award was "predicated entirely" on her defamation claim and that this Court erred by treating petitioner's claim solely as an "employment claim." (Pet. Rule 59 Mem. at 2-3). These contentions are rejected. First, petitioner simply did not make it clear in her amended petition or other submissions that she was abandoning her wrongful termination claim and proceeding exclusively on her defamation claim. Indeed, she moved to vacate the entire award, not just part of it. Hence, I decided petitioner's original motion to vacate the arbitration award on the assumption that she was still pursuing a wrongful termination claim — as *one* of her claims. Second, however, I also understood that petitioner was relying, at least in part, on a defamation claim, and I decided the motion with the understanding that petitioner was pursuing a defamation claim. *See* Mem. Dec. at 2, 10-11. Hence, petitioner is incorrect in suggesting that the Court did not consider the merits of her defamation claim.

2. In my Memorandum Decision, I wrote that "Campbell failed to provide the Court even with the transcripts of the arbitration proceedings." Mem. Dec. at 10. Petitioner contends that the Court "declined to accept the transcripts" that she subpoenaed from the NASD and shipped to the Court. (*See* Pet. Rule 59 Mem. at 7; Pet. Reply at 6). While I do not recall the circumstances surrounding the delivery of the transcripts, I would surmise that, even assuming my Chambers did decline the transcripts, my staff did so because it is not proper procedure for a party to subpoena thousands of pages of documents directly to Chambers without the Court's permission.

Appendix C

In any event, petitioner thereafter had an opportunity to submit the transcripts. On June 19, 1998, I held a conference in the case. Although petitioner contends that at the conference the Court "indicated . . . that it did not wish the record to be produced" (Pet. Reply Mem. at 6), in fact — as my notes of the conference confirm — I instructed "[petitioner] to submit m/l [memorandum of law] and anything else that she wants to be part of the record by 7/13/98." Accordingly, I directed petitioner to submit a memorandum of law and "anything else" that she wanted to be part of the record by July 13, 1998, and petitioner could have submitted the transcripts and any exhibits then.

Even assuming, however, for argument's sake that the Court did seek to dissuade petitioner from submitting the transcripts, the result in this case would be no different. Indeed, I decided the motion only after carefully considering the arguments advanced by petitioner, including her representations as to the evidence produced during the arbitration proceedings. As I originally noted, petitioner's challenge is to the weight and credibility of the evidence, and she has not met her burden of proving manifest disregard of the law or facts. In essence, she attempts in this motion, as in her original motion, to retry her case.

For example, petitioner concedes that respondents offered the "Ramos Report" to support their contention that she failed to follow firm procedures. Petitioner merely takes the position that the Ramos Report is not to be believed. (Pet. Rule 59 Mem. at 3-4, 6-9). In addition, petitioner concedes that respondents offered a transcript of a telephone

call.[1] Again, what petitioner attacks is the legitimacy and accuracy of that transcript. (*Id.* at 4, 8). Finally, petitioner argues that respondents Lutnick and Needleman testified untruthfully and in a manner that contradicted other evidence before the arbitration panel. (*See, e.g.*, Pet. Mem. at 9-10, 11).

Hence, petitioner cannot deny that respondents submitted evidence to contradict her defamation claim, as they presented evidence to explain their reasons for terminating her employment and filling out the Form U-5 accordingly. Rather, she attacks the truthfulness of that evidence and the credibility of respondents' testimony. Even assuming that she presented evidence to support her defamation claim, it was up to the arbitrators to make factual findings, weigh the evidence, resolve evidentiary conflicts, and assess the credibility of witnesses. *See International Bhd. of Elec. Workers v. Niagara Mohawk Power Corp.*, 143 F.3d 704, 706 & 725-26 (2d Cir. 1998) (holding that arbitrators' fact-finding cannot be reviewed *de novo* by district court); *Chisolm v. Kidder, Peabody Asset Management, Inc.*, 966 F. Supp. 218, 229 (S.D.N.Y. 1997) ("it is not the function of this court to reweigh the evidence, but only to determine whether, in reaching their decision, the arbitrators manifestly disregarded the law"), *aff'd*, No. 97-7828, 1998 WL 695041 (2d Cir. Jul. 28, 1998) (citing *Halligan v. Piper Jaffray*, 148 F.3d 197 (2d Cir. 1998), but holding that there was evidence from which to conclude that petitioner failed to prove his

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1. The Memorandum Decision refers to a "tape recording" of a conversation. Mem. Dec. at 11. Apparently, a transcript of that conversation, not the tape itself, was admitted in evidence at the proceeding.

claim); *Areca, Inc. v. Oppenheimer & Co.*, 960 F. Supp. 52, 57 (S.D.N.Y. 1997) (court is not empowered to review arbitrators' factual findings and credibility determinations); *St. Lawrence Explosives Corp. v. Worthy Brothers Pipeline Corp.*, 916 F. Supp. 187, 193 (N.D.N.Y. 1996) (holding that if "a ground for the arbitrator's decision can inferred from the facts of the case, the award should be confirmed").

Petitioner does correctly point out that in *Halligan v. Piper Jaffray*, 145 F.3d 197, 203 (2d Cir. 1998), the Second Circuit held that there was a manifest disregard of the law and facts in the case as there was "overwhelming evidence" of discrimination presented by the petitioner. *Halligan* does not stand for the proposition, however, that district courts may reweigh the evidence and second-guess the arbitrators' credibility determinations. Rather, *Halligan* holds that an arbitration award may be set aside if it is in *manifest* disregard of the law or facts.

Here, petitioner urged the arbitrators to reject as unbelievable the Ramos report, the transcript of the telephone conversation, and the testimony of Lutnick and Needleman. The arbitrators were not persuaded, and thus there clearly existed an ample basis from which the arbitrators could conclude that the information on petitioner's Form U-5 was not false. Resolving the conflicts in the evidence in respondents' favor, the arbitrators found that petitioner simply did not meet her burden of proof as to her defamation claim. Clearly, there is at least a "colorable justification for the outcome reached" by the arbitration panel and, accordingly, the arbitration award must be confirmed.

Appendix C

Brotman v. Sant Cassia Investment Management, No. 96 Civ. 6727, 1997 WL 401671, at *3 (S.D.N.Y. Jul. 16, 1997).

3. Petitioner contends that the Court adopted "a misbegotten view of reality" by finding that petitioner "participated in the arbitration voluntarily." (Pet. Rule 59 Mem. at 9 (citing Mem. Dec. at 14)). This contention lacks merit.

The Court did not find that Campbell participated in the arbitration voluntarily. Rather, the Court found that there was nothing in the record to suggest that petitioner submitted her claims to arbitration *in*voluntarily. Had petitioner actually submitted her claims for arbitration involuntarily, she could have, and should have: (1) objected to arbitration, by noting her objection either in her statement of claim or elsewhere; (2) reserved her right to bring a court action, by reserving that right either in her statement of claim or elsewhere; or (3) commenced a lawsuit, leaving respondents to move to compel arbitration. Petitioner did none of these things. Instead, she filed a claim with the NASD and did so without objecting or reserving her rights. Moreover, at no time — either during the arbitration or during the proceedings in this Court — has Campbell submitted a sworn statement or any other evidentiary material representing that she commenced the arbitration proceedings involuntarily.

4. The Court has considered petitioner's other arguments on the Rule 59 motion and rejects them.

Appendix C

CONCLUSION

Petitioner's Rule 59 motion is denied.

SO ORDERED.

Dated: New York, New York
October 20, 1998

s/ Denny Chin
DENNY CHIN
United States District Judge

APPENDIX D — MEMORANDUM DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED SEPTEMBER 24, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

98 Civ. 3973 (DC)

MARY TERESE CAMPBELL,

Petitioner,

– against –

CANTOR FITZGERALD & CO., INC., *et al.*,

Respondents.

MEMORANDUM DECISION

* * *

CHIN, D.J.

In this case, Mary Terese Campbell ("Campbell") petitions the Court to vacate an arbitration award rendered by a three-member National Association of Securities Dealers ("NASD") panel on March 5, 1998. Respondents oppose the petition. For the following reasons, the petition to vacate is denied and the arbitration award is confirmed. In addition, the separate suit filed by petitioner pending before the Court, *Campbell v. Cantor Fitzgerald & Co., Inc., et al.*, No. 98 Civ. 4547 (DC), is dismissed with prejudice.

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BACKGROUND

Campbell was employed by respondent Cantor Fitzgerald & Co., Inc. ("Cantor Fitzgerald") as an institutional sales person from October 19, 1987 until March 25, 1992, when she was discharged. (Resp. Mem. at 3). On April 20, 1992, Cantor Fitzgerald filed with the NASD a Form U-5, a termination notice that stock brokerages must file with the NASD when the employment of certain employees is terminated, reporting that Campbell had been "[d]ischarged" for "FAILURE TO FOLLOW FIRM PROCEDURES." (Knopf Aff. Ex. A).

On March 25, 1995, Campbell initiated an arbitration proceeding against respondents before the NASD. Campbell alleged that she was wrongfully discharged and that she was defamed by the notation on her Form U-5. After initiating arbitration, Campbell amended her claim.[1] Shortly thereafter, respondents moved to dismiss it. (Resp. Mem. at 6). The arbitration panel reserved decision on the motion and Campbell was permitted to present her case to the panel. What follows is a brief synopsis of the parties' accounts of the events precipitating the termination of Campbell's employment.

Until 1991, both Campbell and her husband worked at Cantor Fitzgerald. (Pet. ¶¶ 1-3). In January 1991, Campbell's

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1. Campbell amended her statement of claim on June 26, 1996. After she rested and respondents renewed their motion to dismiss, Campbell sought leave to amend her complaint a third time. The panel converted Campbell's motion to amend her second complaint to a motion to conform the pleadings to the proof, and, only as so converted, granted the motion. (Resp. Mem. at 7; Pet. Ex. A).

husband learned of a U.S. Treasury notification concerning certain restrictions on agreements to sell or dispose of U.S. Treasury securities. (*Id.* ¶ 5). Campbell's husband repeatedly brought what he believed were violations of the notice to the attention of Cantor Fitzgerald's chairman and chief executive officer, who allegedly ignored him. (*Id.* ¶ 8). Because Cantor Fitzgerald purportedly refused to comply with the procedures, Campbell's husband "felt compelled to resign" and did so in June 1991. (*Id.* ¶¶ 10-13).

Later that year, the Securities & Exchange Commission (the "SEC") initiated an investigation of Cantor Fitzgerald's handling of the auction trading of U.S. Treasury issues. (*Id.* ¶ 16-17). Shortly after an article appeared in the Wall Street Journal about the SEC investigation on March 11, 1992, Campbell was informed that she had been placed on "administrative leave" and should not report to work again until further notice was given. (*Id.* ¶¶ 18-19). Campbell's employment was then terminated at a March 25, 1992 meeting during which she was accused of violating firm procedures because she had allegedly disclosed confidential information and undercharged Chase Securities, where her husband then worked. (*Id.* ¶ 20).

Respondents claimed that Campbell's allegation of wrongful termination was a tactic to obscure her own violations of firm procedures. (Resp. Mem. at 3-4). Respondents maintained that Campbell's employment was terminated for cause because she disclosed proprietary and confidential customer information to Chase, the disclosure of which was transcribed in a telephone conversation between Campbell and her husband on August 21, 1991. In addition,

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Campbell purportedly undercharged commissions to a Chase customer account managed by her husband. (*Id.* at 4). Respondents analyzed Campbell's Chase cash trades from July 1991 to March 1992 (the "Ramos Report") and concluded that she charged commissions totalling only $3,928.64 on trades involving $505 million of U.S. Government securities when the commissions should have been $13,882.52. (*Id.*). Campbell maintains that the Ramos Report was flawed and that respondents fabricated the reasons for the termination of her employment.

Campbell's hearings before the NASD began in April 1996 and concluded in August 1997. (Pet. Mem. ¶ 7). The panel conducted thirty hearing sessions that generated 2200 pages of testimony. (Pet. Ex. A; Resp. Mem. at 7). The panel heard the testimony of four fact witnesses and one expert witness, and received 24 exhibits. (Resp. Mem. at 7). Testimony and documents concerning the SEC investigation of Cantor Fitzgerald was also allowed into evidence and considered by the panel despite respondents' contention that such evidence was irrelevant. (*Id.* at 18).

When Campbell rested, respondents renewed their motion to dismiss. The panel issued its award on March 5, 1998 granting respondent's motion to dismiss as to the "wrongful termination and all other claims sounding in wrongful termination" because Campbell was an at-will employee whose employment could be terminated for any or no reason. (Pet. Ex. A). As to Campbell's other claims, including her defamation claim, the panel held that she "failed to sustain her burden of proof." (*Id.*). The panel also assessed fees in the amount of $45,000 ($1,500 for each of

30 hearing sessions) against Campbell pursuant to Rule 10205(c) of the Code of Arbitration Procedure. (*Id.*).

This petition followed.

DISCUSSION

A. *Judicial Review of Arbitration Awards*

"The party seeking to vacate or modify an arbitration award bears the burden of proof, and the showing required of that party in order to avoid summary affirmance of the award is high." *DeGaetano v. Smith Barney, Inc.*, 983 F. Supp. 459, 461 (S.D.N.Y. 1997) (citation omitted); *see also Ottley v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987); *Folkways Music Publishers v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993). Arbitration awards are subject to "very limited review" to avoid undermining the goals of arbitration, namely, settling disputes efficiently and avoiding lengthy and expensive litigation. *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 12 (2d Cir. 1997) (quoting *Folkways Music*, 989 F.2d at 111). "[T]he court's function in confirming or vacating an arbitration award is severely limited." *Areca, Inc. et al. v. Oppenheimer & Co., Inc. et al.*, 960 F. Supp. 52 (S.D.N.Y. 1997) (quoting *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 808 (2d Cir.), *cert. denied*, 363 U.S. 843 (1960)).

The Federal Arbitration Act (the "FAA") provides that an award may be vacated if: (1) the award was procured by corruption, fraud or undue means; (2) the arbitrators

exhibited "evident partiality" or "corruption"; (3) the arbitrators were guilty of misconduct; or (4) the arbitrators exceeded their power. *See generally* 9 U.S.C. § 10(a); *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 202 n.3 (2d Cir. 1998). Misconduct warranting vacatur pursuant to Section 10(a) of the FAA must be serious; it "must amount to a denial of fundamental fairness of the arbitration proceeding." *Areca*, 960 F. Supp. at 54-55 (citations omitted). To prove evident partiality of the arbitration panel, a party must demonstrate "more than just the 'appearance of bias.' " *Id.* at 56 (citations omitted). In fact, evident partiality "may not be shown by alleged procedural or evidentiary errors, by legitimate efforts to move the case along, or by failure to follow the rules of evidence." *Id.* (citations omitted).

In addition to the statutory grounds for vacatur, the Second Circuit also recognizes that an arbitration award may be vacated if it is in "manifest disregard of the law." *Halligan*, 148 F.3d at 201-02; *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953). The "manifest disregard" test is rigorous. It requires "something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law." *Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 892 (2d Cir. 1985) (quoted in *Willemijn*, 103 F.3d at 12). To modify or vacate an award on this ground, a court must find that: "(1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." *Halligan*, 148 F.3d at 202 (citing *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 821 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 695 (1993)).

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B. *Petitioner's Claims*

Campbell asserts that the arbitration award should be vacated principally because: (1) it is in manifest disregard of the law and was arbitrary and capricious; (2) the arbitrators were biased, engaged in misconduct, and ruled in excess of their power; (3) the award violates Campbell's right to due process; and (4) it violates public policy in assessing her forum fees. (Pet. ¶ 63; *see also* Pet. Mem. at 3-4).

I address Campbell's claims in turn.

1. *Manifest Disregard of Law; Arbitrariness & Capriciousness*

Campbell alleges that the arbitration award in this case was made in manifest disregard of the law because she proved that the respondents published and republished false and defamatory documents about her; her evidence was incontrovertible; the arbitrators disregarded the incontrovertible evidence; and the arbitrators disregarded the law presented and explained at the hearings. She also alleges that the arbitrators' ruling that she failed to sustain her burden of proof "arbitrarily and capriciously constitute[s] manifest disregard of the law." (Pet. Mem. at 3).

To support these allegations, Campbell relies on the facts surrounding her claim and what she maintains she proved during the arbitration hearings. In addition, Campbell relies on a recent Second Circuit decision in which the court vacated an arbitration award as being in manifest disregard of the law. *See Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197

(2d Cir. 1998). Because Campbell places so much emphasis on the *Halligan* decision (*see* Pet. Mem. at ¶¶ 2, 12-24, 33, 35, 37, 38, 48-49, 51; Pet. Reply at ¶¶ 1-2, 4, 6, 9, 13, 15-19), I briefly discuss its facts and the Second Circuit's holding in the case.

The petitioner in *Halligan* claimed that his employment was terminated in violation of the Age Discrimination in Employment Act (the "ADEA"). After extensive hearings, the arbitrators rendered a written award that set forth the parties' claims and defenses and denied relief to the petitioner. The award did not, however, contain any explanation or rationale for the result. The award was confirmed by the district court but the Second Circuit reversed.

Acknowledging that there is "strong judicial support" for arbitration, the Second Circuit pointed out, nevertheless, that there is increasing controversy over the enforceability of "mandatory pre-dispute arbitration agreements" in the context of "statutory claims of employment discrimination." *Halligan*, 145 F.3d at 201. The Second Circuit did not reach the issue, however, because it concluded that the arbitrators' decision in that case was rendered in manifest disregard of the law and facts. First, in view of the *strong evidence* that Halligan was fired because of his age, the court noted that it was "inclined to hold that [the arbitrators] ignored the law or the evidence or both." *Id.* at 204. Second, the court noted that its initial view was strengthened by the fact that the panel in this case did not explain its award.

The Second Circuit made clear, however, that it was "not holding that arbitrators should write opinions in every case

or even in most cases." *Id.* Rather, *Halligan* stands for the proposition that where a court is inclined to find a manifest disregard of the law on the part of arbitrators, the court can take into account the arbitrators' failure to explain their decision. In essence, the court can infer from the absence of an explanation that the panel did not have a reasonable explanation for its award.

The instant case highlights some of the problems that exist with respect to mandatory arbitration of employment disputes. Although arbitration in theory is supposed to be faster, more efficient, and less expensive than litigation, the parties here were required to participate in thirty hearing sessions, spread out over sixteen months. The arbitrators ruled against Campbell, but did not explain their reasoning. The arbitrators then assessed Campbell $45,000 in hearing fees. Campbell's frustration is understandable.

Nonetheless, *Halligan* is distinguishable from the instant case because Campbell simply has not demonstrated any manifest disregard of the law or "arbitrary and capricious behavior" that would justify vacating the arbitration award. In *Halligan*, the evidence of discrimination was extremely strong; the arbitrators were apprised of the correct legal principles; and thus the Second Circuit concluded that the arbitrators must have manifestly disregarded the law. Here, Campbell has not demonstrated that she presented strong evidence to support her claims in the arbitration proceedings. In fact, Campbell failed to provide the Court even with the transcripts of the arbitration proceedings.

Even though the arbitrators did not explain the reasoning behind their decision, I am not persuaded that the applicable

law in this case was ignored. *Colonial Penn Ins. Co. v. American Centenniel Ins. Co.*, No. 96 Civ. 6051, 1997 WL 10004 (S.D.N.Y. Jan. 10) (citation omitted), *aff'd*, 133 F.3d 906 (2d Cir. 1997); *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 821 (2d Cir. 1997). Indeed, Campbell never identifies any principle of law that the panel purportedly failed to follow. Rather, her approach is a factual one that focuses on the credibility of the evidence presented, which is not a proper basis upon which to vacate the award at issue.

Moreover, the arbitrators' reasoning in this case can certainly be inferred from the facts: Campbell was an at-will employee whose employment could be terminated for any non-discriminatory reason or for no reason at all;[2] her employer terminated her employment purportedly because she failed to follow firm procedures; the employer's decision was supported by, among other things, a tape recording of a conversation during which Campbell purportedly improperly disclosed confidential information and a report showing that

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2. Excerpts of the proceedings provided by respondents show that Campbell testified as follows:

> I acknowledge that Cantor Fitzgerald certainly had the power to fire me, but I don't think any employer has the right to be abusive or to be unfair or to treat any employee different than the custom and practice of the firm.

(Tr. 2272). In fact, Cantor Fitzgerald was not legally required to treat Campbell fairly or consistently with any purported custom or practice. It was prohibited only from treating Campbell differently because of an unlawful, discriminatory reason. Campbell has not alleged any such discrimination.

Campbell had purportedly undercharged commissions; and, the reason for the termination of her employment was documented as required on a Form U-5. Under New York law, Campbell had no claim for wrongful termination, and the arbitrators rejected the defamation claim because they were not persuaded that Campbell had proven that the reported reasons for the discharge were false and defamatory. In addition, certain of Campbell's claims would appear to have been barred by the one-year statute of limitations for intentional torts.

Accordingly, the motion to vacate on the grounds of manifest disregard of the law and/or arbitrary and capricious behavior is denied.

2. *Evident Partiality & Misconduct*

Campbell alleges that the arbitrators showed "evident partiality and misconduct during the hearings" because they disregarded the law and the evidence presented. (Pet. Mem. at 3). She provides no proof, however, to support this allegation and offers instead only conclusory statements as to her view of what the evidence that she presented proved. Campbell has simply not come forward with any evidence of misconduct or partiality by the arbitrators except for the fact that the arbitrators ruled against her. Indeed, Campbell did not complain about the arbitrators or their conduct in this matter until after the adverse award was issued.

Accordingly, the motion to vacate on the grounds of evident partiality and/or misconduct is denied.

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3. *Due Process*

Campbell also argues that the "panel's manifest disregard of the law and facts violates [her] right to due process." (Pet. Mem. at 13). As already discussed, Campbell has not met her burden of proving any manifest disregard of the law. In any event, I also hold that there was no violation of her due process rights. The mandatory arbitration to which Campbell was required to agree pursuant to the Form U-4 did not violate Campbell's constitutional due process and does not violate public policy. There is nothing in the record before me to demonstrate that fundamental fairness was violated in this case. The arbitration proceedings were conducted in accordance with NASD arbitration procedures, and it appears that Campbell was afforded a complete opportunity to present her case to the arbitration panel.

Accordingly, the motion to vacate on due process grounds is denied.

4. *Forum Fees*

The arbitration panel in this case, relying upon a specific NASD Rule,[3] assessed Campbell $45,000 in forum fees. Campbell contends that the assessment of forum fees against her violates public policy.

Campbell raises a serious issue: whether an employee who is required, as a condition of employment, to agree to

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3. NASD Rule 10205(c) states in relevant part: "The arbitrators in their award, shall determine the amount chargeable to the parties as forum fees and shall determine who shall pay such forum fees."

the mandatory arbitration of employment disputes must pay for all or part of the arbitrators' fees when a dispute is submitted for arbitration. Indeed, some courts have held, in the context of statutory discrimination claims, that employees cannot be required to pay such fees when employers insist that employees agree to mandatory arbitration. *See, e.g.*, *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465, 1468 (D.C. Cir. 1997) (holding in Title VII case that an employer may not require an employee to arbitrate all disputes against it *and* also require the employee to pay all or part of the arbitrators' fees); *Martens v. Smith Barney, Inc.*, __ F.R.D. __, No. 96 Civ. 3779, 1998 WL 344802, at *8 (S.D.N.Y. June 23, 1998) (holding in Title VII case that an arbitration agreement "cannot impose financial burdens on plaintiff access to the arbitral forum").

I do not reach the issue in this case, however, for Campbell has not properly presented it. There is nothing in the record to suggest that Campbell submitted her claims for arbitration involuntarily. She initiated the arbitration proceedings by filing a Statement of Claim with the NASD and paying a $1,500 deposit. Although the parties have not submitted a complete record to the Court, the Court has been provided with copies of certain of Campbell's submissions to the arbitration panel, and none of these submissions contains any indication that Campbell objected to proceeding via arbitration rather than by litigation. Indeed, Campbell's Second Amended Statement of Claim begins by stating: "Claimant, Mary Terese Campbell, by her attorneys, . . . hereby submits the following claims in controversy to Arbitration, in accordance with the Constitution, Rules and Regulations of the National Association of Securities

Dealers, Inc." The Second Amended Statement of Claim makes no mention of the Form U-4 and sets forth no objection to proceeding by arbitration. Nor has Campbell even alleged, by affidavit or otherwise, that she commenced the arbitration proceedings involuntarily.[4] Indeed, the record contains no indication that Campbell had any objection to the enforceability of the arbitration clause or to proceeding via arbitration rather than litigation until *after* the arbitrators ruled against her.

On this record, I can only conclude that Campbell commenced the arbitration proceedings voluntarily, without objection, and that she therefore is bound by the arbitrators' award.

Accordingly, the motion to vacate on the ground that the assessment of forum fees violates public policy is, in the particular circumstances of this case, denied.

C. ***Petitioner's Related Lawsuit***

On June 26, 1998, Campbell filed a separate lawsuit, *Campbell v. Cantor Fitzgerald & Co., Inc. et al.*, No. 98 Civ. 4547 (DC), against the same parties involved in the arbitration proceeding. This suit alleges the following four causes of action: (1) defamation; (2) intentional infliction

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4. The only reference in the record to the reason why Campbell proceeded by arbitration rather than by litigation is the representation in her memorandum of law filed in this Court that she and respondents are "covered parties pursuant to Title 15 U.S.C., mandatorily required to arbitrate disputes pursuant to a Form U-4 filed with the NASD." (Pet. Mem. ¶ 4).

of emotional distress; (3) injurious falsehood; and (4) making false statements to injure plaintiff. (Compl. ¶¶ 45-58). The complaint in this separate suit is based on precisely the same underlying facts as Campbell's claims in arbitration. Indeed, aside from minor variations, paragraphs 6-38 of the complaint are literally identical to paragraphs 1-34 of Campbell's petition to vacate. Because I am denying Campbell's petition to vacate and confirming the arbitration award, the complaint in case No. 98 Civ. 4547 (DC) is dismissed with prejudice as barred by res judicata.

CONCLUSION

For the reasons stated herein, the petition to vacate is denied and the arbitration award at issue is hereby confirmed. The Court also hereby dismisses with prejudice the case *Campbell v. Cantor Fitzgerald & Co., Inc., et al.*, No. 98 Civ. 4547 (DC). The Clerk of the Court shall enter judgment accordingly.

SO ORDERED.

Dated: New York, New York
September 24, 1998

s/ Denny Chin
DENNY CHIN
United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR PANEL REHEARING DATED AND FILED MARCH 1, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 1 day of MAR two thousand

Present:

Hon. Dennis Jacobs

Hon. Wilfred Feinberg

Hon. Robert Katzmann

CIRCUIT JUDGES,

Docket No. 98-9582

Campbell

Plaintiff-Appellant,

v

Appendix E

Cantor Fitzgerald, et. al.,

Defendants-Appellees.

A petition for panel rehearing having been filed herein by Appellant Mary Terese Campbell

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED.**

FOR THE COURT
ROSEANN B. MACKECHNIE,
Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

APPENDIX F — RELEVANT STATUTE

9 U.S.C. § 10

Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made . . .

* * * *

(2)

No. 00-394

Supreme Court, U.S.
FILED

OCT 13 2000

CLERK

IN THE

Supreme Court of the United States

MARY TERESE CAMPBELL,

Petitioner,

—v.—

CANTOR FITZGERALD & CO., INC., CANTOR FITZGERALD SECURITIES CORP., CANTOR FITZGERALD L.P., a Limited Partnership, HOWARD LUTNICK, and HARRY NEEDLEMAN, jointly and severally,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner, Mary Therese Campbell ("Campbell"), worked at Cantor Fitzgerald ("Cantor") in its New York office as an institutional salesperson from October 19, 1987 to March 25, 1992 when she was discharged. Three years later, on March 25, 1995, Campbell started an arbitration at the National Association of Securities Dealers ("NASD"). Campbell seemed to contend that she was wrongfully terminated in retaliation for her husband's participation or assistance in a Securities and Exchange Commission investigation of Cantor. She also claimed that Cantor defamed her by filing a U-5 form which indicated that she had been terminated for failure to follow firm practices. (App. 2d)

The NASD hearings spanned five months, involved 30 hearing sessions and generated 2,200 pages of transcript testimony. On March 5, 1998, the NASD arbitration panel issued its award. The panel granted Cantor's motion to dismiss Campbell's wrongful termination claim, finding that she was an at-will employee who could be terminated for any reason or no reason. The panel also found that Campbell failed to sustain her burden of proof as to the defamation claim, that some claims were untimely, and assessed forum fees against her pursuant to NASD Rule 10205(c). (App. 4d-5d)

Campbell then petitioned the United States District Court for the Southern District of New York to vacate the arbitration award, and thereafter filed an amended petition on June 17, 1998 (98 Civ. 3973). (App. 1d) Campbell contended that the award should be vacated because the

award was: (1) in manifest disregard of the law; (2) arbitrary and capricious; (3) affected with partiality through the disregard of evidence and controlling law; (4) in excess of the panel's power; and (5) in violation of public policy. (App. 7d) Campbell essentially argued that because of the overwhelming evidence she presented to the NASD, she should have won. Campbell did not submit the NASD transcripts with her petition or amended petition. (App. 7d)

While that petition was pending, on June 26, 1998, Campbell filed a separate lawsuit against Cantor in the Southern District of New York alleging defamation, intentional infliction of emotional distress, injurious falsehood and making false statements to injure her based on the New York Attorney General's posting on his website a copy of the U-5 (98 Civ. 4547). (App. 14d) The claims were based upon the same facts as Campbell's arbitration claims. Campbell did not submit the NASD transcripts as part of the record of this separate lawsuit.

On June 19, 1998, the District Court held a conference with the parties. It directed Campbell to submit all of the materials that she wanted to include in the record to the Court by July 13, 1998. Campbell neither submitted the NASD transcripts to the Court pursuant to the Court's directive, nor sought an extension of time within which to do so. (App. 2c-3c)

In a memorandum decision dated September 24, 1998, the District Court denied Campbell's petition to vacate the arbitration award. The Court found that she was attempting to re-try her entire case, urging the Court to reconsider the panel's determination as to the weight and

credibility of the evidence. The Court specifically determined that Campbell had failed to demonstrate any manifest disregard of the law because she never identified any principle of law which the panel purportedly failed to follow. The Court further found that Campbell provided no proof of partiality or misconduct by the panel, nor did she provide any evidence that her due process rights had been violated since the arbitration was conducted in accordance with NASD arbitration procedures. The Court also affirmed the assessment of forum fees, finding that Campbell had not involuntarily submitted the dispute to arbitration, raised no objection to the proceeding and otherwise offered no evidence that she was involuntarily forced to proceed with the arbitration. (App. 1d) The Court then dismissed with prejudice her separate defamation lawsuit finding that, because it was based on exactly the same underlying facts as the arbitration claims, the claims were barred by the doctrine of res judicata. (App. 1d) Two judgments were then issued by the Court, one dated September 29, 1998 confirming the arbitration award, and one dated September 24, 1998 dismissing the defamation case.

On October 12, 1998, Campbell filed a motion to vacate the Court's decision purportedly pursuant to Fed. R. Civ. P. 59.[1] (App. 1c) The grounds for the motion were that: (1) the District Court committed "manifest errors" of fact and law in reaching its earlier decision; and (2) the judgment had to be altered to prevent "manifest injustice"

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[1] Because Campbell's "Rule 59" motion was filed untimely, the Court of Appeals recognized in its Order of October 5, 1999 that it was a motion pursuant to Fed. R. Civ. P. 60.

to Campbell. In her motion for reconsideration, Campbell reargued the merits of her original petition to vacate the arbitration award contending that the District Court erroneously disregarded Campbell's compelling evidence the first time around. She argued that the Court failed to consider the overwhelming credibility and volume of her evidence of defamation. She further argued that the Court erred in treating her claim solely as a wrongful termination claim, when, in fact, the petition to vacate was predicated entirely upon her defamation claim which she contended the Court failed to consider. Campbell finally argued that the District Court erred in failing to undertake a de novo review of the entire NASD record. (App. 1c-7c) At the time of Campbell's motion to vacate, she still had not submitted the NASD transcripts to the Court, nor any other evidence beyond what was before the Court when it decided not to vacate the arbitration award.

On October 20, 1998, the District Court issued a memorandum decision denying the motion to vacate. (App. 1c-7c) The Court clarified that in affirming the arbitration award it had indeed considered the merits of Campbell's defamation claim as well as her employment claim. The Court also found that Campbell had the opportunity to present the NASD transcripts in accordance with its directive at the July 1998 conference between the parties, but that she had failed to do so. The Court also explained that even if Campbell had submitted the transcripts, the result would have been the same. First, the Court had held that Campbell's summary of the evidence in her brief and supporting papers would not justify vacating the award. Because it had already considered the matter in the light Campbell herself had cast on it, which was

presumably favorable to her case, the transcript would not have improved her position. Second, all of her arguments focused on the weight and credibility of the evidence, which the Court could not re-examine in light of the narrow scope of its review of the arbitration award and that she failed to articulate a principal that had been manifestly disregarded. At no time during the proceedings before the District Court did Campbell submit the NASD transcripts. (App. 1c-7c)

On November 16, 1998, Campbell appealed the District Court's denial of reconsideration to the United States Court of Appeals for the Second Circuit. Campbell's notice of appeal said that it was an appeal "from the Memorandum Decision entered October 22, 1998, denying Petitioner's F.R.Civ.P. Rule 59 motion to vacate the judgment of this court entered September 29, 1998 denying Petitioner's Motion to Vacate an arbitration award in 98 Civ. 3973 and dismissing the petition filed in *Campbell v. Cantor Fitzgerald et al.*, No. 98 Civ. 4547 (DC)." (APP 1)

When the notice of appeal was filed, Campbell had not yet obtained the NASD transcripts. Campbell moved, first in the District Court, and then in the Court of Appeals, to correct the record to include the transcripts of the NASD proceedings not adduced below.

The Court of Appeals entered a scheduling order on December 21, 1998. On January 29, 1999 and February 22, 1999, Campbell moved for an enlargement of the time for filing briefs in order to permit her to subpoena the NASD transcripts, which she still had not done. Campbell then made a third and fourth motion to extend time to obtain the NASD transcripts. She filed her appeal brief out

of time after the last motion was denied. Excerpts from the NASD transcripts were finally produced in the "Joint" Appendix filed with her brief for the first time, without Cantor's consent or the Court's permission.

Campbell's brief to the Court of Appeals argued that the District Court erred in its original underlying judgments confirming the arbitration award and dismissing Campbell's defamation claim. Cantor's appellee brief responded to these issues. The briefs did not address whether the District Court's later decision denying reconsideration was correct, but addressed the merits of the underlying judgments as framed by Campbell's principal brief.

Counsel was advised by the Court of Appeals' staff that the caption of Cantor's brief was incorrect. As that caption was taken from Campbell's brief, the Court notified Campbell of the deficiency as well. It reflected that two cases were on appeal, namely, the arbitration confirmation action and the defamation action. Campbell moved to amend the caption to include the defamation action. This led counsel for Cantor to examine the Notice of Appeal more closely. Based on that examination, in response to the motion to amend the caption, Cantor filed a motion to dismiss as untimely Campbell's appeal from the dismissal of her defamation action on the ground that the court lacked jurisdiction.

On October 5, 1999, a motions panel of the Court of Appeals issued an order denying the motion to dismiss. The Court held, however, based on the notice of appeal's language that "Campbell's appeals are limited to the order denying reconsideration as specified in the notice of appeal;

she cannot appeal the underlying judgment in either case." Supplemental briefing on the District Court order denying reconsideration was allowed. Campbell then sought reconsideration of the motions panel order, which was denied. (App. 2b)

After oral argument, a merits panel of the Court of Appeals issued a summary order on December 23, 1999. It affirmed the District Court's denial of Campbell's reconsideration motion. The Court reached that result for three reasons. (App. 2b-5b)

First, the Court found that despite having had ample opportunity to do so, Campbell failed to proffer to the District Court the NASD transcripts. She could not, therefore, complaint that the District Court failed to consider the transcripts. (App 3b)

Second, the Court held that even if Campbell had submitted the transcripts with her reconsideration motion, the District Court could have properly disregarded them since that evidence was available to Campbell throughout the District Court proceedings and was not, therefore, newly discovered. (App. 4b)

Third, the Court reasoned that even if Campbell had properly entered the transcripts, there was nonetheless a reasonable basis for the District Court to conclude that the arbitration award was not in manifest disregard of the law. The Court of Appeals reached this conclusion because all of Campbell's arguments in the District Court related to the credibility of the witnesses and the weight of the evidence which the District Court could not properly reconsider.

Indeed, the Court of Appeals found that Campbell failed to "identify a single legal principle or standard that the district court overlooked." (App. 4b) Campbell then sought rehearing en banc by the Court of Appeals, which was denied. (App. 1a)

Campbell now petitions this Court for a writ of certiorari. Because this case involves only the consequences of Campbell's failure adequately to create a record, Campbell's petition should be denied.

SUMMARY OF THE ARGUMENT

Campbell's own failures below do not entitle her to a writ of certiorari. Campbell seeks certiorari based on her failure to designate in her notice of appeal the judgments she wished to appeal, her failure to proffer the NASD transcripts to the District Court, and ultimately her failure adequately to identify to the arbitrators or either court below any principle of law allegedly "manifestly disregarded." She now claims that both the District Court and Court of Appeals did not fully consider the matter. Campbell's failure to make an adequate record below or properly perfect her appeal is not grounds for obtaining a writ of certiorari.

First, the Court of Appeals properly restricted the scope of its review of Campbell's appeal to the judgment set forth in the notice of appeal. The notice of appeal said that it was an appeal from a denial of a motion for reconsideration before the District Court. This is precisely what the Court of Appeals reviewed. Campbell did not include in her notice of appeal the underlying judgments entered by the District Court, and so she cannot now complain that the Court of Appeals erroneously failed to review those judgments, and impermissibly limited the scope of its review.

Further, Campbell never submitted the record of the NASD proceedings to the District Court which she now contends warranted reversal by the Court of Appeals. Campbell had ample opportunity during the time in which this matter was pending to obtain the transcripts, and present them to the District Court below but she failed to do

so even after an explicit directive by the District Judge. She did not create a record of a tender or proffer. Campbell similarly cannot complain that the District Court failed to consider that which she never submitted, and that she was denied a full hearing by the Court of Appeals on that same ground.

In any event, even assuming the manifest disregard standard for appeal of arbitral awards is the appropriate one to be applied, as both the District Court and Court of Appeals correctly found, Campbell failed to present to either Court any clearly defined principle of law that the arbitrators allegedly ignored. As such, both of her appeals were properly denied on their merits.

Campbell simply has failed to set forth any reason to warrant the grant of a writ of certiorari. All of the failings that she now claims are error were her own. This case does not present any matter of public importance warranting this Court's consideration, and indeed, is so fact-intensive that it would mire this Court in a virtual de novo review of the record. Thus, no writ should issue and Campbell's petition should be denied.

ARGUMENT

POINT I

CAMPBELL'S FAILURE TO INCLUDE IN HER NOTICE OF APPEAL THE UNDERLYING JUDGMENTS OF THE DISTRICT COURT DOES NOT ENTITLE HER TO A WRIT OF CERTIORARI NOR CAN IT FORM THE BASIS OF ERROR BY THE COURT OF APPEALS

The Court of Appeals correctly confined the scope of its review to the District Court's Order denying reconsideration, which was the only order specified in Campbell's notice of appeal. There is no merit to Campbell's argument that the Court of Appeals impermissibly limited the scope of its review. The Court of Appeals reviewed precisely the judgment that Campbell specified in her notice of appeal.

This case involved three separate judgments by the District Court, namely: (1) a judgment dated September 29, 1988 denying Campbell's petition to vacate the arbitration award; (2) a judgment dated September 24, 1988 dismissing Campbell's separate defamation action; and (3) an order dated October 22, 1998 denying Campbell's motion for reconsideration. The only judgment specified in the notice of appeal was the reconsideration order.

Campbell's notice of appeal read as follows:

> Notice is hereby given that Mary Therese Campbell, through her undersigned attorneys, hereby appeals to the United States Court of Appeals for the Second Circuit from the Memorandum Decision entered October 22, 1998, denying Petitioner's F.R.Civ.P. Rule 59 motion to vacate the judgment of this court entered September 29, 1998 denying Petitioner's Motion to Vacate an arbitration award in 98 Civ. 3973 and dismissing the petition filed in *Campbell v. Cantor Fitzgerald et al.*, No. 98 Civ. 4547 (DC).

(APP 1)

Although Campbell may have wanted to appeal the underlying judgments of the District Court confirming the arbitration award in Cantor's favor and dismissing her separate related defamation claim, those judgments were not included in Campbell's notice of appeal. No timely motion was made to the District Court to amend the notice of appeal. Consequently, those judgments were not the proper subject of the appeal, and the Court of Appeals correctly limited its review to the reconsideration order of the District Court as specified in the notice of appeal.

A. The Underlying Judgments Were Not Included In The Notice Of Appeal And So Review On Appeal Was Correctly Restricted To The District Court's Reconsideration Order

If, as Campbell contends, she wished to appeal all three of the decisions of the District Court, she should have included those decisions in the notice of appeal. To bring up each of the judgments for review, the notice of appeal would have had to read somewhat as follows:

> Campbell appeals 'from the Memorandum Decision entered October 22, 1998, denying Petitioner's F.R.Civ.P. (sic) Rule 59 motion to vacate the judgment of this court entered September 29, 1998, **and from the judgment** denying Petitioner's Motion to Vacate an arbitration award in 98 Civ. 3973 **and from the judgment** dismissing the petition filed in *Campbell v. Cantor Fitzgerald et al.*, No. 98 Civ. 4547 (DC).'

This is not what Campbell's notice of appeal said. In the October 5, 1999 order, the Court of Appeals correctly observed that the only order on appeal was, as specified in the notice of appeal, the District Court's denial of reconsideration. The motions panel and the merits panel of the Court of Appeals both read what was written in the notice of appeal, and confined the scope of review accordingly.

Fed. R. App. P. 3(c) requires that an appellant specify in the notice of appeal the order or decision for which review is sought. The Rule provides in part that: "The notice of appeal must . . . designate the judgment, order or part thereof being appealed." Under Fed. R. App. P. 3(c), only the judgments or orders specified in a notice of appeal may properly be considered by the court. Kowsh

v. Board of Elections of the City of New York, 99 F.3d 78, 80 (2d Cir. 1996)(holding that only judgment denying injunction was properly before the court as other decisions of district court were not specified in the notice of appeal); see also Terkildsen v. Waters, 481 F.2d 201, 206 (2d Cir. 1973)(holding that parts of judgment not specified in notice of appeal may not be considered by court).

Furthermore, where two or more judgments are distinct, designation of one in the notice of appeal leads to the inference that no appeal is sought with respect to the undesignated judgments. As observed in Terkildsen:

> if the parts [of the judgment] are truly independent, the more likely inference from the designation of particular parts in the notice of appeal is that appellant does not desire review of the parts not designated.

Terkildsen, 481 F.2d at 206 (quoting 9 Moore's Federal Practice ¶ 203.18 at 756.)

Here there is no question that each of the three judgments of the District Court were totally distinct and independent. Nor was there any question that Campbell did not specify in her notice of appeal that she was appealing the judgment confirming the arbitration award or the judgment dismissing her defamation claim. The notice of appeal indicated that the only order being appealed was that which denied her motion for reconsideration. To read the notice of appeal any other way would have effected a drastic change in the scope of the appeal. Because Campbell failed to include the underlying judgments in her

notice of appeal, those judgments were not properly the subject of the appeal, and the two panels (motions and merits) of the Court of Appeals were correct in restricting review to the reconsideration order.

B. Campbell's Failure To Move Before The District Court To Amend Her Notice Of Appeal Similarly Precluded The Court Of Appeals From Reviewing The Underlying Judgments

Campbell never moved to amend her notice of appeal to include the two additional judgments that she claims the Court of Appeals incorrectly failed to consider. Fed. R. App. P. 4(a)(4)(B)(ii) contemplates the filing of amended notices of appeal. However, an amendment to the notice of appeal to include other judgments is only permitted where a party seeks additionally to appeal a decision on a post-judgment tolling motion. That was not the situation presented here. In this case, Campbell sought in the Court of Appeals to include the two original judgments of the District Court having failed to do so initially. This could only have been accomplished by timely motion in the District Court pursuant to Fed. R. App. P. 4(a)(5)(A) or 4(a)(6).

Fed. R. App. P. 4(a)(5)(A) and 4(a)(6) provide the exclusive method by which a party may file a late notice of appeal or alter or amend the notice to include judgments other than post-judgment orders. Under Rule 4(a)(5)(A), the District Court may extend for a period of 30 additional days, the time to file a notice of appeal provided the party seeking the extension moves within 30 days of entry of the

judgment and the court finds excusable neglect or good cause. Under Rule 4(a)(6), the District Court may reopen the time for appeal but only if: (1) the motion to reopen is made within 180 days of entry of the judgment or 7 days of notice of entry, whichever is earlier; (2) the District Court finds that the moving party did not receive notice of entry within 21 days of entry of the judgment or order; and (3) no party would be prejudiced.

Campbell never moved in the District Court either to file a late notice or to reopen the time for appeal to include in her notice the District Court's original judgments and these are the only means by which Campbell could have brought up those judgments for review. Having failed to specify these judgments in her original notice of appeal, and thereafter having failed to move in the District Court for leave to do so, Campbell was precluded from appealing those judgments to the Court of Appeals.

Finally, that the parties briefed the merits of the two underlying judgments was insufficient both as a matter of law and fact to expand the scope of the appeal. The briefs cannot expand the scope of an appeal which is determined by reference to the notice of appeal alone. See Kowsh, 99 F.3d at 80 (declining to address two of the three arguments contained in appellant's brief on the ground that only the first of those arguments was properly before the court based on the issues as specified in the notice of appeal).

The apparent expansion of the issues on the appeal was precipitated by Campbell's brief which was not appropriately limited to the reconsideration order notwithstanding the notice of appeal. Cantor responded to

the arguments raised by Campbell's principal brief and was not led to re-examine the notice of appeal until after an issue arose over the caption. Cantor did not, as Campbell suggested below, knowingly acquiesce in her attempt to expand the appeal, and indeed, objected to it. The content of the parties' briefs did not enlarge the scope of the appeal to include two judgments which were not specified in the notice of appeal. Thus, the Court of Appeals correctly limited its review, consistent with the notice of appeal, to the District Court's order denying reconsideration.

POINT II

CAMPBELL'S FAILURE TO PROFFER THE NASD TRANSCRIPTS TO THE DISTRICT COURT DOES NOT ENTITLE HER TO A WRIT OF CERTIORARI UNDER RULE 10 AND CANNOT BE THE BASIS FOR ANY ERROR BY THE COURT OF APPEALS

Campbell never presented the NASD transcripts to the District Court despite having had ample opportunity to do so. She did not submit the transcripts to the Court of Appeals until after she had requested and obtained four extensions of time for filing her appeal brief. Clearly, Campbell cannot now claim that the Court of Appeals should have reversed the judgment of the District Court because of its failure to review a record that was never submitted to it.

Indeed, Campbell did not even obtain the record or make any effort to submit it until her appeal to the Court of Appeals. Campbell could have procured the NASD record at any time during the years in which this matter was pending. She could have obtained it after the arbitration proceeding, but she did not. She could have obtained it before filing her petition to vacate the award, but she did not. She could have obtained it during the pendency of that petition, or the later motion to vacate, but she did not.

Obtaining the record would have been a fairly simple matter. NASD Rule 10326 provides a right to a transcript:

> A verbatim record by stenographic reporter or a tape recording of all arbitration hearings shall be kept. If a party or parties to a dispute elect to have the record transcribed, the cost of such transcription shall be borne by the party or parties making the request unless the arbitrators direct otherwise. The arbitrators may also direct that the record be transcribed. If the record is transcribed at the request of any party, a copy shall be provided to the arbitrators.

Thus, Campbell could simply have requested a copy of the transcripts from the NASD at any time, and submitted them to the District Court for its consideration.

Campbell has argued, however, that she was somehow precluded by the District Court from submitting the record. Even if this were true (although the District Court held otherwise), Campbell had a duty, if she wished to preserve the Court's refusal to review the transcripts as error, at least to attempt to tender them even over the Court's purported objection. At the very least, Campbell should have made a proffer as to what the record contained. Campbell did nothing to preserve the record on this issue, and indeed, could not do so, as her motions to extend time in the Court of Appeals reveal that she never obtained the transcripts herself during the District Court proceedings.

The contention that the District Court refused to permit Campbell to submit the transcripts is squarely contradicted by the record. In June 1998, the District

Court held a conference, and directed Campbell to submit whatever materials she wished by a date certain. As the District Court explained:

> . . .as my notes of the conference confirm – I instructed "[petitioner] to submit m/l [memorandum of law] and anything else that she wants to be part of the record by 7/13/98." Accordingly, I directed petitioner to submit a memorandum of law and "anything else" that she wanted to be part of the record by July 13, 1998, and petitioner could have submitted the transcripts and any exhibits then.

(App. 3c)

Notwithstanding this explicit directive, Campbell failed to obtain and submit the transcripts. Indeed, Campbell did not even procure the transcripts until after requesting four extensions of time for the filing of briefs in the Court of Appeals.

Having failed to tender evidence to the District Court, Campbell cannot claim that the Court's failure to consider that evidence is reversible error and that the Court of Appeals should have reversed on that ground. On the contrary, Campbell's failure to present the transcript alone provided sufficient grounds for the District Court to affirm the award. See Commonwealth Associates v. Lestos, 40 F. Supp.2d 170 (S.D.N.Y 1999)(holding that "the lack of a complete record alone is sufficient to require [confirmation of arbitration award]" because the absence of a full record

"leaves the Court unable to exclude the possibility that the award is supported by evidence that [the party seeking to vacate the award] has not placed before it."). See also Malek v. Federal Insurance Co., 994 F.2d 49 (2d Cir. 1993)(observing that offer of proof as to content of evidence is required to preserve issues on appeal); United States v. Curcio, 759 F.2d 237 (2d Cir. 1985)(finding that failure to proffer evidence constitutes waiver of issue on appeal).

As the District Court noted, it "denied the motion only after carefully considering the arguments advanced by [Campbell] including her representations as to the evidence produced during the arbitration proceedings." (App. 3c). Thus, having accepted Campbell's characterization in her brief and elsewhere of the evidence, omission of the transcripts was harmless.

In the proceedings below, Campbell did not articulate any statute or well developed principle of the common law which she could show was presented to the arbitrators, clearly governed the result, and was demonstrably ignored. Campbell simply failed to meet the "manifest disregard" standard she sought to invoke even assuming its validity and applicability here. Consequently, her appeals were properly denied on their merits.

Campbell argued, as she continues to argue now, that the evidence in the NASD record overwhelmingly supported her claims. She contended that the demonstrable incredibility of witnesses and overall weight of the evidence proved her claims of defamation and wrongful termination. This, however, was not sufficient to make even the

threshold showing of manifest disregard, and surely was not sufficient to require the District Court to delve into 2,200 pages of testimony to re-examine Campbell's claims. As the District Court correctly held:

> Even though the arbitrators did not explain the reasoning behind their decision, I am not persuaded that the applicable law in this case was ignored. Indeed, Campbell never identifies any principle of law that the panel purportedly failed to follow. Rather her approach is a factual one that focuses on the credibility of the evidence presented, which is not a proper basis upon which to vacate the award at issue.

(App. 9d-10d)

Even if the claims in the arbitration proceeding, i.e., defamation and wrongful termination, themselves constituted the governing law which was purportedly ignored by the arbitrators, Campbell's arguments still fail. First, each and every case involving the discharge of an employee in the securities industry potentially implicates claims of defamation since the Form U-5 is a required filing whenever a securities employee is terminated. Thus, the termination of every securities employee would potentially constitute defamation, and would require, following arbitration, a de novo review of the record to determine whether the law of defamation was ignored by the arbitrators.

Second, if the well defined applicable law was the law of retaliatory termination, that too must fail. It is well settled that New York does not recognize a cause of action for wrongful discharge of at-will employees purportedly in violation of public policy which Campbell advanced at the arbitration. See Murphy v. American Home Products Corporation, 58 N.Y.2d 293, 461 N.Y.S.2d 232 (N.Y. 1983)(declining to create a cause of action for wrongful discharge). See also Weider v. Skala, 80 N.Y.2d 628, 593 N.Y.S.2d 752 (N.Y. 1992)(noting that New York law does not recognize claims for retaliatory termination). Having rejected a cause of action for retaliatory termination of employees who engage in allegedly protected activities, surely the New York courts would not recognize a cause of action for retaliatory termination of an employee arising from his or her spouse's activities. But that was precisely the claim posited by Campbell at the arbitration. Thus, there is no principle of law protecting an employee from termination where the alleged retaliation is based on the activities of a spouse. Consequently, the arbitrators specifically found that:

> As to the claim of wrongful termination and all other claims sounding in wrongful termination, the Panel finds that as a matter of law and fact that the Claimant was an at will employee and as such may be terminated for any or no cause. The panel further finds that the termination of the Claimant did not fall within any of the exceptions recognized under law for imposing liability upon the employer in the event of the termination of an at will employee.

(App. 4b)

Given the state of the law in New York, Campbell could not and indeed did not identify any specific, clearly defined, governing principle of law of sufficient public policy significance that the arbitrators purportedly disregarded. Campbell failed to make this threshold showing in the District Court or the Court of Appeals to sustain her claim of manifest disregard.

Throughout, Campbell misapprehended the limited nature of the scope of arbitration review. Campbell continues to urge that a searching factual review of the NASD record was required. This re-weighing of the evidence and credibility is precisely what the District Court could not, and properly did not, do. The Court of Appeals correctly agreed when it held that:

> . . . even if Campbell had properly entered the transcripts, there was a reasonable basis for the District Court to conclude the arbitration panel's conclusions were not in manifest disregard of the law. The district court properly deferred to the arbitration panel's factual determinations. Campbell fails to identify a single legal principle or standard that the district court overlooked. Campbell's motion merely attempted to re-try her case.

Thus, neither the District Court nor the Court of Appeals improperly restricted the scope of its review of

Campbell's appeals. Before the arbitrators, the District Court and the Court of Appeals, Campbell never identified a principle of law allegedly "manifestly disregarded."

CONCLUSION

Because this case presents no issue of general public importance, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX - NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARY TERESE CAMBPELL,	:	
	:	Docket Nos.
Petitioner,		98 Civ. 3973 (DC)
v.	:	98 Civ. 4547 (DC)
CANTOR FITZGERALD & CO., HOWARD LUTNICK, Jointly and severally and HARRY NEEDLEMAN, Jointly and severally,	:	NOTICE OF APPEAL
Respondents.	:	

Notice is hereby given that MARY TERESE CAMPBELL, through her undersigned attorneys, hereby appeals to the United States Court of Appeals for the Second Circuit from the Memorandum Decision entered October 22, 1998, denying Petitioner's F.R.Civ.P. Rule 59 motion to vacate the judgment of this court entered September 29, 1998 denying Petitioner's Motion to Vacate an arbitration award in 98 Civ. 3973 and dismissing the petition filed in *Campbell v. Cantor Fitzgerald et al.*, No. 98 Civ. 4547 (DC).

by s/Patrick J. Murphy PM 9229

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